FOR ARGUMENT

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In The
Supreme Court of the United States

THE BLACK & DECKER DISABILITY PLAN,

Petitioner,

v.

KENNETH L. NORD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

WILLIAM G. BRUNER III
Senior Corporate Counsel
THE BLACK & DECKER CORPORATION
701 East Joppa Road
Towson, Maryland 21286
Phone: (410) 716-2692
Fax: (410) 716-2660

WINSTON & STRAWN
LEE T. PATERSON
Counsel of Record
JOHN R. ATES
AMANDA C. SOMMERFELD
333 South Grand Avenue, 38th Floor
Los Angeles, California 90071-1543
Phone: (213) 615-1700
Fax: (213) 615-1750

Attorneys for Petitioner The Black & Decker Disability Plan

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. RESPONDENT HAS NOT OPPOSED PETITIONER'S CONTENTIONS THAT THE TREATING PHYSICIAN RULE IS INCONSISTENT WITH ERISA'S GOALS, INFRINGES ON DEPARTMENT OF LABOR AUTHORITY, IS BASED ON A FALLACIOUS PREMISE AND IS INCONSISTENT WITH THIS COURT'S DECISION IN *FIRESTONE v. BRUCH*

Petitioner argued in its opening Brief on the Merits that the Ninth Circuit's treating physician rule (1) is inconsistent with ERISA's goals of not discouraging employers from adopting disability plans or from increasing benefits, (2) infringes on the Department of Labor's ("DOL") authority over ERISA, (3) makes a fallacious assumption that a treating physician's opinion is superior to an examining or reviewing physician's opinion, and (4) is inconsistent with the standard of review established by this Court in *Firestone Tire & Rubber Co. v. Bruch*. This Court's Rule 24.2 requires Respondent's Brief to Comply with Rule 24.1(i) by containing, "The Argument, exhibiting clearly the points of fact and of law presented . . . " Respondent has not opposed any of Petitioner's arguments and apparently has no objection to them.

II. RESPONDENT HAS RAISED FOR THE FIRST TIME ISSUES WHICH WERE NOT BEFORE THE NINTH CIRCUIT, NOT IN THE OPPOSITION TO THE WRIT OF CERTIORARI AND WHICH ARE NOT IMPLICATED IN THIS WRIT

Respondent raised for the first time in his brief on the merits that (1) the Ninth Circuit's treating physician rule is procedural and, therefore, does not raise evidentiary issues regarding the weight that should be given to a treating physician's opinion, (2) Petitioner failed to give

legally sufficient reasons for its denial of benefits under 29 U.S.C. § 1131(1), and (3) an inherent conflict of interest is sufficient to cause *de novo* review.

Respondent failed to raise these issues before the Ninth Circuit. This Court has refused to hear issues which were not raised at or reached by the court below. *See Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 431 (2002) (stating that it is the Court's practice "to decide cases on the grounds raised and considered in the Court of Appeals," quoting *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998)); *TRW Inc. v. Andrews*, 534 U.S. 19, 21 (2001) (stating that the Court would not reach an issue because the issue was not raised or briefed below); *Lopez v. Davis*, 531 U.S. 230, 244 n.6 (2001) (declining to address an issue that was not "raised or decided below"); *cf. United States v. Bean*, ___ U.S. ___, 123 S. Ct. 584, 586 n.2 (2002) (noting that an argument raised for the first time in the respondent's merits brief to the Court is waived).

Furthermore, Respondent did not raise these issues in his Opposition to the Petition for Writ of Certiorari. This Court's Rule 15.2, which applies to briefs in opposition to the Petition for Writ of Certiorari, provides:

> "Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition."

This Court has refused to consider issues which were not raised in the Opposition to the Writ of Certiorari. *See Lee v. Kemna*, 534 U.S. 362, 376 n.8 (2002) (deeming an argument waived because it was not raised in the respondent's opposition to the petition for certiorari); *Knowles v. Iowa*, 525 U.S. 113, 116 n.2 (1998) (finding the respondent waived an argument by failing to raise it in its brief in opposition to the petition for certiorari); *Gardebring v. Jenkins*, 485 U.S. 415, 427 n.12 (1988); *Oklahoma City v. Tuttle*, 471 U.S. 808, 815 (1985).

Finally, the Petition for Certiorari is limited to the issue of the Ninth Circuit's treating physician rule and its effect on the decision of an ERISA plan administrator; it does not include these issues which Respondent has now newly raised in his Opposition Brief. This Court's Rule 14.1(a) provides, "Only those questions set out in the petition, or fairly included therein, will be considered by the Court." This Court has refused to consider issues which are outside the issues presented by the Petition for Certiorari. *Irvine v. California*, 347 U.S. 128, 129-130 (1954) ("We disapprove the practice of smuggling additional questions into a case after we grant certiorari. The issues here are fixed by the petition unless we limit the grant, as frequently we do to avoid settled, frivolous or state law questions."); *Toyota Motor Manufacturing Company v. Williams*, 534 U.S. 184, 202 (2002).

A. The Ninth Circuit's Treating Physician Rule Is An Evidentiary Rule Which Grants Deference And Special Weight To The Opinion Of A Treating Physician

Respondent argues that the Ninth Circuit's treating physician rule is a procedural rule which does not raise issues regarding the weight of a treating physician's opinion. This argument is contrary to Respondent's argument before the district court and the Ninth Circuit. [Plaintiffs' Opposition to Defendant's Motion for Summary Judgment, p. 21; Pet. C.A. Br. 48] It is also contrary to the Ninth Circuit's decision in *Regula v. Delta Family-Care Survivorship Plan*, 266 F.3d 1130 (2001), which first applied the Ninth Circuit's treating physician rule from Social Security Administration ("SSA") cases to ERISA cases.

In Respondent's opening brief to the District Court he argued, "The court's analysis of the claim should be guided by the treating physician rule, specifically that the opinion of the treating physician receive great weight. . . . " [Plaintiff's Opposition to Defendant's Motion for Summary Judgment p. 21] In the Ninth Circuit, Respondent argued, "The court's analysis of the claim should be guided by the treating physician rule, specifically that the opinion of the treating physician receive greater weight. . . . " [Pet. C.A. Br. 48] The Ninth Circuit agreed with Respondent's requested analysis. He has now reversed course and argues for the first time that the Ninth Circuit's treating physician rule is merely procedural and does not raise issues regarding the weight of a treating physician's opinion. [Res. Br. 12]

The Ninth Circuit first held that it would apply its treating physician rule in SSA cases to ERISA cases in *Regula v. Delta Family-Care Survivorship Plan.* In *Regula,* the Ninth Circuit stated that its treating physician rule requires the plan administrator to give deference and special weight to the opinions of treating physicians:

> "The treating physician rule applied in the Social Security setting requires that the administrative law judge . . . *give deference* to the opinions of the claimant's treating physician. . . . This grant of *deference* to a treating physician's opinions increases the accuracy of disability determinations, by forcing the ALJ who rejects those opinions to come forward with specific reasons for his decision, based on substantial evidence on the record."

266 F.3d at 1139. (Emphasis added.)

In *Regula*, the Ninth Circuit also stated:

> "As in the Social Security disability context, a rule requiring plan administrators to give *special weight* to the opinions of treating physicians is a similarly common sense requirement that, while inconsistent with the exercise of absolute discretion, is perfectly consistent with the plan administrator's role in properly determining whether a particular claimant is disabled."

Id. at 1144. (Emphasis added.)

In this case, the Ninth Circuit stated that it was bound by *Regula* to apply its SSA treating physician rule to ERISA cases. [Pet. App. 10]

There is no merit to Respondent's argument that the treating physician rule is only procedural since it is contrary to his own position before the District Court and the Ninth Circuit and is contrary to the Ninth Circuit's definition of its treating physician rule. This Court should refuse to consider this issue since it is raised for the first time in this Court, is contrary to Respondent's position below, was not raised in the Opposition to the Writ of Certiorari and is not fairly included among the issues presented by the Petition for Certiorari.

B. Respondent Has Waived The Issue That Petitioner's Written Decision Did Not Meet The Requirements Of ERISA Or DOL Regulations By Failing To Raise It Before

Respondent's claim that Petitioner failed to state sufficient reasons for its denial of benefits under 29 U.S.C. § 1131 and 29 C.F.R. § 2560.503-1(h)(3) was never raised before the Ninth Circuit, was not raised in his Opposition to the Petition for Writ of Certiorari and is not fairly

included in the Writ of Certiorari before this Court. The only issue regarding the adequacy of the written decision which Respondent raised before the Ninth Circuit was Petitioner's failure to provide specific reasons for the rejection of Janmarie Forward's answer to a hypothetical question. [Appellant's Opening Brief to the Ninth Circuit p. 28] In regard to that issue, the Ninth Circuit held that, "Black & Decker was under no duty to rebut with specificity all evidence adduced by Nord to support his claim." [Pet. App. 12. fn. 7]

Furthermore, Respondent did not raise this issue in his Brief in Opposition to the Petition for Certiorari.

This Court should refuse to consider this issue since it was not raised before the Ninth Circuit, was not raised in the Opposition to the Writ of Certiorari and is not fairly included in the issues presented by the Petition for Certiorari.

C. Respondent's Contention That An Inherent Conflict Of Interest Alone Is Sufficient To Trigger *De Novo* Review Was Not Raised Before The Ninth Circuit Or In His Opposition To The Writ Of Certiorari

Respondent's argument that Petitioner had an inherent conflict of interest and, therefore, *de novo* review is proper, if not precluded by this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), is precluded because it was not argued before the Ninth Circuit and was not presented in his Opposition to the Writ of Certiorari.

Respondent's argument that Petitioner was operating under a conflict of interest confuses the difference between an inherent conflict of interest and an actual conflict of interest which affected the plan administrator's decision.

The Ninth Circuit found that Petitioner was "operating under an inherent conflict of interest" because Petitioner acted as both the funding source and the plan administrator. [Pet. App. 8] Under Ninth Circuit precedent, where there is an inherent conflict of interest, the claimant has the burden of producing material probative evidence tending to prove an actual conflict of interest which affected the plan administrator's decision. *Atwood v. Newmont Gold Co., Inc.*, 45 F.3d 1317, 1323 (9th Cir. 1995). The Ninth Circuit found that its treating physician rule provided the material probative evidence tending to prove that an inherent conflict of interest was in fact an actual conflict of interest which affected the plan manager's decision.[1] Absent the Ninth Circuit's treating physician rule, there is only an inherent conflict of interest, which is not sufficient in the Ninth Circuit to trigger *de novo* review.

Respondent argued before the Ninth Circuit that Petitioner had an inherent conflict of interest and that Petitioner's administration of his claim was material, probative evidence of an actual conflict of interest. [Appellant's Opening Br. p. 29] However, he never claimed that an inherent conflict of interest, standing alone, was sufficient to trigger *de novo* review.

Moreover, Respondent did not raise this issue in his Brief in Opposition to the Petition for Certiorari.

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[1] The Ninth Circuit also said that the plan manager's contradiction of the opinion of Janmarie Forward "is not only highhanded but also certainly *some* evidence of a conflict." [Pet. App. 11] (Emphasis added.) However, the Ninth Circuit did not find that it was sufficient standing alone to support an actual conflict of interest. [Pet. App. 11]

This Court should refuse to consider this issue since it is raised for the first time in this Court and was not raised in the Opposition to the Writ of Certiorari.

III. PETITIONER PROPERLY CONCLUDED THAT RESPONDENT WAS NOT COMPLETELY UNABLE TO PERFORM THE DUTIES OF A MATERIAL PLANNER

All of the physicians – treating, examining, and reviewing – determined that Respondent suffered from mild degenerative disc disease and was experiencing pain. [L: 45-46; 49-50; 53; 73-75; 81; 84; 95; 97-99] Petitioner has never denied that Respondent has a back injury or that he suffers some back pain.

Respondent's physicians, Dr. Hartman and Dr. Williams, both filled out check-the-box Physical Capacity Evaluations for Respondent. [L: 53; 83] They both circled pre-printed choices that Respondent could sit for one hour at a time and could sit for one hour a day. Neither of them circled pre-printed choices limiting how long during a day Respondent could stand or how long during a day he could walk. They also both checked boxes that put limitations on Respondent's ability to lift more than five pounds. Respondent also relies upon an excuse-from-work slip filled out by Dr. Hartman in March 1998 which estimated that he would not be able to return before the end of the year. [L: 66]

The only physician who expressed a comprehensive opinion about Respondent's ability to perform the job of a material planner was Dr. Mitri. [L: 43-48] Dr. Mitri examined Respondent, reviewed his medical records and reviewed his job description. The Ninth Circuit found that "Dr. Mitri

opined that Nord should be able to perform sedentary work, with no material limitations in his ability to sit, while taking pain reduction medication." [Pet. App. 5] Dr. Mitri also concluded, " . . . the patient should be able to do sedentary work with some interruption by walking in between." [L: 45] Dr. Mitri's report is consistent with Respondent's statement that he did lawn care "when it needs to be done" and went fishing. [L: 139-140] Dr. Mitri's report is also consistent with medical records stating that he had "mild LS radiculopathy"[2] [L: 99], that medication helps Respondent's pain, and that he tolerates pain with medication [L: 68, 87, 89].

Respondent was asked twice by Metlife to have his treating physicians comment on Dr. Mitri's opinion regarding Respondent's ability to perform the job of a material planner. [Pet. App. 87, 88] Respondent failed to provide any information from his treating physicians rebutting Dr. Mitri's conclusion that he could perform his job. Respondent complains because Petitioner found persuasive the only medical report that concluded he was able to perform his job. However, only one report exists because, even after being asked twice, Respondent did not obtain a response to Dr. Mitri's opinion that he was able to perform the duties of a material planner.

The Plan Manager, in exercising the discretion required of him by the plan, reviewed all of the medical opinions. [Pet. App. 91, ¶ 8, ¶ 9; 93, ¶ 19] He discussed with Janmarie Forward, the human resources representative, the requirements of the job. [Pet. App. 92-3, ¶ 17] He determined that the company could accommodate

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[2] A disorder of the spinal nerve roots. Stedman's, *Medical Dictionary* (26th Ed., 1995). [Reply App. 1]

Respondent's lifting limitations in the Physical Capacity Evaluations by providing help to him for lifting. *Id.* The Plan Manager determined that the company could accommodate the sitting limitations by allowing Respondent to sit or stand at will.[3] *Id.* Based upon all of the medical opinions available to him and the reasonable accommodations the company could offer to Respondent, the Plan Manager determined that Respondent was not completely unable to perform the job of a material planner. [Pet. App. 93, ¶ 19, ¶ 20]

IV. THE NINTH CIRCUIT'S DETERMINATION THAT A MEDICAL DIAGNOSIS OF DISABILITY BY A TREATING PHYSICIAN IS EQUIVALENT TO A DETERMINATION OF INABILITY TO PERFORM A JOB IS BASED ON A FALSE PREMISE

The Ninth Circuit's holding that Petitioner should have accepted the treating physician's determination of physical impairment as equivalent to a determination of a complete inability to perform a job is based upon a fallacious premise. A medical diagnosis of disability is not equivalent to the plan requirement of a "complete inability (whether physical or mental) of a participant to engage in his regular occupation with the Employer." [L: 20; Article 6.01] A medical diagnosis of physical impairment is only the first step in determining a claimant's ability to perform a job.

[3] As this Court has said in an analogous context, " . . . it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effect of those measures – both positive and negative – must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the [Americans with Disabilities] Act." *Sutton v. United Air Lines Inc.*, 527 U.S. 471, 482 (1999).

A treating physician may or may not have the expertise to express an opinion regarding a claimant's ability to perform a job.

> "Physicians have the education and training to evaluate a person's health status and determine the presence or absence of an impairment. **If the physician has the expertise and is well acquainted with the individual's activities and needs, the physician may also express an opinion about the presence or absence of a specific disability. For example, an occupational medicine physician who understands the job requirements in a particular workplace can provide insights on how the impairment could contribute to a workplace disability.**" Cocchiarella, *Guides to the Evaluation of Permanent Impairment* (5th Ed. 2002), p. 8. American Medical Association Press. [Appendix 3-4]

In its regulations, the SSA refuses to accept the treating physician's opinion regarding disability as binding on the ALJ, "A statement by a medical source that you are 'disabled' or 'unable to work' does not mean that we will determine that you are disabled." 20 C.F.R. § 404.527(e)(1) (2002).

The Plan Manager in this case had to consider not only the medical opinions, but also the requirements of the job and the reasonable accommodations that the employer could offer the employee. Respondent's treating physicians did not express any opinion in regard to his ability to perform the duties of a material planner, even though MetLife twice asked Respondent to obtain the response of his treating physicians to Dr. Mitri's evaluation that he could do his job.

The Ninth's Circuit's treating physician rule in effect assumes that a treating physician's opinion of disability is equivalent to an opinion that a claimant has a complete

inability to perform a job. There is no evidentiary or logical support for that assumption and, therefore, this Court should overturn the Ninth Circuit's decision.

V. THE NINTH CIRCUIT'S TREATING PHYSICIAN RULE APPLIES A MORE STRINGENT STANDARD OF REVIEW TO ERISA PLAN ADMINISTRATOR DETERMINATIONS THAN FEDERAL COURTS APPLY TO LOWER COURT OR ADMINISTRATIVE AGENCY DETERMINATIONS

This Court said, in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), that a court should review the decision of an ERISA plan administrator where the plan provides the administrator with discretion by an abuse of discretion standard. However, the Ninth Circuit revised this Court's standard of review by requiring the plan administrator to defer to treating physicians and give special weight to their opinions by requiring the plan administrator to *rebut the opinions of treating physicians by specific legitimate reasons supported by substantial evidence*. Not only is this revision inconsistent with *Firestone*, it is also inconsistent with the standards for (1) court review of lower court decisions and (2) court review of administrative agency determinations.

A. Federal Courts Have Found No Need For A Rule Requiring Deference And Special Weight For The Opinions Of A Treating Physician In Reviewing Lower Court Decisions

The standard of review of district court decisions by appellate courts is set forth in Federal Rule of Civil Procedure 52(a) ("court/court"). That rule requires an appellate court to affirm determinations of fact by lower courts

unless they are clearly erroneous. Appellate courts review the factual determinations of federal district courts with more scrutiny than they review administrative agency determinations. *Dickinson v. Zurko*, 527 U.S. 150 (1999). In court/court review, the reviewing court must affirm a lower court's factual determinations unless it has a definite and firm conviction that an error has been committed. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

There is no rule in federal court/court review which (1) requires the lower court to rebut the opinion of a treating physician by specific, legitimate reasons supported by substantial evidence, (2) states that failure to follow a treating physician rule is evidence of a conflict of interest by the lower court, or (3) states that failure to use a treating physician rule will be used to measure the reasonableness of a lower court's decision. The reviewing court merely reviews to determine whether the lower court "set forth the findings of fact and conclusions of law which constitute the grounds of its action." Fed. Rule Civ. Proc. 52 (a).

Federal courts are called upon to review conflicting medical determinations in a myriad of court/court cases. For example: employer liability for seaman's injuries *DeZon v. American President Lines, LTD*, 318 U.S. 660 (1943); death penalty decisions *Barefoot v. Estelle*, 463 U.S. 880 (1983); competency to stand trial *White v. Estelle*, 459 U.S. 1118 (1983), *Drope v. Missouri*, 420 U.S. 162 (1975); competency for execution *Ford v. Wainwright*, 477 U.S. 399 (1986); civil commitment *Addington v. Texas*, 441 U.S. 418 (1979); employee impairment under the Americans with Disabilities Act *Toyota Motor Manufacturing Company v. Williams*, 534 U.S. 184, 195 (2002); student impairment under the Individuals with Disabilities Education Act *Cedar Rapids*

Community School District v. Garret F., 526 U.S. 66 (1999); vacine injury compensation *Knudsen v. Sec'y of the Dept. of Health and Human Services*, 1992 U.S. Claims LEXIS 29, *19 (Fed. Cl. Dec. 17, 1992); and admissibility of evidence *Blackburn v. Alabama*, 361 U.S. 199 (1960). This Court and the federal appellate courts have found no need for a treating physician rule in those cases. There is nothing particular or special about the testimony of treating physicians in ERISA cases which compels the use of a treating physician rule by reviewing courts, particularly where reviewing courts do not use that rule in reviewing treating physician opinions in court/court cases.

B. Federal Courts Have Found No Need For A Rule Requiring Deference And Special Weight For The Opinions Of A Treating Physician In Reviewing Administrative Agency Decisions

The Administrative Procedure Act sets forth the standard governing judicial review of findings of fact made by federal administrative agencies ("court/agency"). 5 U.S.C. § 706. Courts are required by the Administrative Procedure Act to affirm federal administrative agency factual decisions if they are supported by substantial evidence on the record as a whole. In *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992), this Court said, "A court reviewing an agency's adjudicative action should accept the agency's factual findings if those findings are supported by substantial evidence on the record as a whole. The court should not supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence."

Federal courts have not adopted any rules in court/agency cases which (1) require an administrative agency to rebut the opinion of a treating physician by specific

legitimate reasons supported by substantial evidence,[4] (2) provide that failure to follow a treating physician rule is evidence of a conflict of interest by the agency, or (3) provide that failure to use the treating physician rule will be used to measure the reasonableness of an agency's decision. The reviewing court merely looks to see whether on the record it would have been possible for a reasonable jury to reach the administrative agency's conclusion. *Allentown Mack v. NLRB*, 522 U.S. 359, 366-367 (1997).

Federal courts are called upon to review conflicting medical determinations in numerous court/agency cases. For example, medical treatment of inmates *Washington v. Harper*, 494 U.S. 210 (1989); release from commitment *Foucha v. Louisiana*, 504 U.S. 71 (1992); and veteran's disability benefits *White v. Principi* 243 F.3d. 1378, 1381 (Fed. Cir. 2001). In none of those cases have the federal appellate courts found it necessary to have a treating physician rule.

In *Richardson v. Perales*, 402 U.S. 389, 402 (1971), an SSA disability case decided by this Court before the SSA adopted its treating physician regulations, this Court reviewed the admissibility of medical testimony in SSA cases.

> "We conclude that a written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself,

[4] Other than the pre-1991 SSA treating physician cases.

> may constitute substantial evidence supportive of a finding by a hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician."

The claimant presented the opinion of his treating physician and objected to the unsworn opinions of five other physicians that were adverse to him. This Court, in ruling that the unsworn opinions were admissible evidence to be weighed by the ALJ against the testimony of the treating physician, stated, "These are routine, standard, and unbiased medical reports by physician specialists concerning a subject whom they had seen. That the reports were adverse to Perales' claim is not in itself bias or an indication of nonprobative character." *Id.* at 404. At least in the context of that case, this Court saw no need for a treating physician rule as a guide to making its decision.

Federal courts regularly review other lower court and agency decisions which include treating physician testimony without the use of a treating physician rule. Respondent and amici in support of Respondent have not suggested any reason why federal reviewing courts have a particular need for the Ninth Circuit's treating physician rule in ERISA disability cases, but are able to function without that same rule in other medical testimony cases. In fact, reviewing courts do not need the Ninth Circuit's treating physician rule and this Court should strike it down.

VI. AMICUS AMERICAN MEDICAL ASSOCIATION'S CONTENTION – THAT SINCE 61% OF PHYSICIANS REPORT THAT THEY NEVER OR RARELY MISREPRESENT A PATIENT'S SYMPTOMS, DIAGNOSIS OR SEVERITY OF ILLNESS THAT TREATING PHYSICIANS' OPINIONS SHOULD BE AFFORDED A REBUTTABLE PRESUMPTION – IS WITHOUT MERIT

Amicus, American Medical Association ("AMA"), argues that the opinions of treating physicians should be afforded a rebuttable presumption of correctness. [AMA Br. p. 10] In support of its position, AMA cites to a statistical survey conducted by AMA's member physicians, published in AMA's journal and distributed to AMA's member physicians, Wynia, *Physician Manipulation of Reimbursement Rules for Patients.*[5] 283 J. Am. Med. Assn. 1858 (April 12, 2000). [AMA Br. p. 10] AMA reports that this study concluded that " . . . the majority of physicians surveyed (61%) reported that they never or rarely misrepresented a patient's symptoms, diagnosis, or severity of illness, even to obtain 'coverage for care that the physicians perceive to be **necessary**' (emphasis added.)" [AMA Br. p. 17] AMA argues that this statistical survey proves that a majority of its member doctors are reliable and supports a rebuttable presumption in ERISA cases in favor of the treating physician's opinion. [AMA Br. pp. 10, 17]

Taking the survey published by AMA and AMA's statement in its brief at face value, 39% of AMA's member treating physicians do misrepresent, more than rarely, their patients' symptoms, diagnosis and severity of illness

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[5] Petitioner cited this statistical survey in its opening brief. [Pet. Br. on the Merits, p. 30]

on insurance claims, and of the remaining 61%, some of them only do it rarely. AMA's argument is astounding. If the American Bar Association announced that 39% of lawyers in the United States were falsifying insurance claims, there would be a national criminal investigation of attorneys. If the American Management Association announced that 39% of corporate executives were filing false insurance claims, a hue and cry would echo through the halls of Congress. However, when 39% of treating physicians misrepresent their patient's medical condition on insurance benefits claims, the AMA cites those statistics as proof there should be a rebuttable presumption that treating physicians' opinions are correct. It is inconceivable that this Court would validate a presumption in favor of treating physicians' opinions when the treating physicians' own professional organization argues to this Court that 39% of its treating physicians, more than rarely, misrepresent their patients' symptoms, diagnosis and severity of illness in insurance benefits claims.

VII. THERE IS NO VIABLE REASON FOR A SPLIT STANDARD OF REVIEW FOR ERISA PLAN ADMINISTRATORS' DISABILITY DETERMINATIONS

The Ninth Circuit reviews the decisions of ERISA plan administrators using a split standard of review, a deferential standard for treating physician's opinions and an abuse of discretion standard for all other decisions. In reviewing plan administrator determinations regarding treating physician opinions, the Ninth Circuit grants deference and special weight to the opinions of treating physicians by requiring the plan administrator to rebut the opinions of treating physicians by specific legitimate reasons supported by substantial evidence. *Regula*, 266 F.3d at 1139. However, where the plan administrator has

been granted discretion by the plan, the Ninth Circuit applies an abuse of discretion standard of review to all other plan administrator decisions. *Atwood v. Newmont Gold Co. Inc.*, 45 F.3d 1317, 1322 (9th Cir. 1995).

Under the Ninth Circuit's split standard of review, a plan administrator may, among other things, weigh the opinions of non-treating physicians, weigh the credibility of statements by the claimant, weigh evidence from witnesses, interpret plan language and determine plan coverage, subject only to an abuse of discretion standard. However, when the plan administrator does not accept the opinion of a treating physician, she is required to give that opinion deference and special weight by rebutting the treating physician's opinion by specific, legitimate reasons supported by substantial evidence. *Regula*, 266 F.3d at 1139, 1144.

There is no logical or legal reason for this split standard of review. The Ninth Circuit's treating physician rule is based on a groundless distrust of plan administrators using their discretion to make ability-to-work determinations which are required by the plan. The rule is based upon sheer speculation that company manager-plan administrators will cheat their co-beneficiaries in the plan. There is no empirical evidence which supports such speculation. Either plan administrators can be trusted as prudent fiduciaries or they can not be trusted at all.

This Court in *Dickenson v. Zurko*, 527 U.S. 150, 154 (1999) recognized "the importance of maintaining a uniform approach to judicial review. . . ." While that case dealt with court review of the findings of an administrative agency, its reasoning is equally applicable to court/administrator review. There is no reason why the standard of review of ERISA plan administrator decisions regarding treating

physician opinions should be different from the standard of review for all other plan administrator decisions.

VIII. CONCLUSION

For the above reasons, this Court should reverse the holding of the Ninth Circuit Court of Appeals that its treating physician rule can be used (1) to show an actual conflict of interest that tainted Petitioner's decision to deny benefits, and therefore, requires *de novo* review of Petitioner's decision, and (2) as a test to determine the reasonableness of the plan administrator's decision. This Court should overturn the reversal of the Order on Summary Judgment and overturn the *sua sponte* order granting judgment to Respondent and remand the case to the Ninth Circuit with direction to review the Plan Manager's denial of benefits for abuse of discretion consistent with this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*.

Respectfully submitted,

WILLIAM G. BRUNER III
Senior Corporate Counsel
THE BLACK & DECKER CORPORATION
701 East Joppa Road
Towson, Maryland 21286
Phone: (410) 716-2692
Fax: (410) 716-2660

WINSTON & STRAWN
LEE T. PATERSON
Counsel of Record
JOHN R. ATES
AMANDA C. SOMMERFELD
333 South Grand Avenue,
38th Floor
Los Angeles, California
90071-1543
Phone: (213) 615-1700
Fax: (213) 615-1750

Attorneys for Petitioner
The Black & Decker
Disability Plan

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Dictionary
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ra·dic·u·lop·a·thy (ra-dik'yu-lop'a-the). Disorder of the spinal nerve roots. SYN radiculitis. [radiculo- + G. *pathos*, suffering] **diabetic thoracic r.**, a type of diabetic neuropathy that affects primarily elderly patients with diabetes mellitus; clinically characterized by thoracic or abdominal pain, mainly anterior, but sometimes with radiation around the trunk from the midline; usually unilateral; may extend over several segments; probably due to ischemic injury of two or more contiguous roots; one type of diabetic polyradiculopathy.

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